UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **BRIAN JOSEPH WEISS,** Debtor.	Case No. **04-63826-7**

MEMORANDUM of DECISION

At Butte in said District this 14th day of February, 2005.

In this Chapter 7 bankruptcy, after due notice, a hearing was held February 8, 2005, at Butte on Debtor's Motion to Avoid Lien under 11 U.S.C. § 522(f), wherein Debtor seeks to avoid a lien held by Janice M. Kuhn ("Janice") against Debtor's homestead property. At the hearing, attorney Robert T. Cummins appeared on behalf of Debtor and attorney R. Clifton Caughron appeared on behalf of Janice. Both Debtor and Janice testified and Debtor's Exhibits A and B were admitted into evidence without objection. At the conclusion of the hearing, the Court took the matter under advisement. This Memorandum of Decision sets forth the Court's findings of fact and conclusions of law.

Debtor and Janice were formerly husband and wife, but their marriage was dissolved on December 3, 2004, pursuant to Findings of Fact, Conclusions of Law and Decree of Dissolution ("Decree of Dissolution") entered in the Montana First Judicial District Court, Lewis and Clark County ("District Court"). Exhibit B. Prior to the time that Debtor and Janice were married, but while the two were living together, Debtor purchased a home located at 3827 Daisy in East Helena, Montana. Debtor filed a Declaration of Homestead Exemption for the above property on

March 21, 2002. Exhibit A.

In the Decree of Dissolution, the District Court determined that Janice's father had contributed $2,005.00 toward the down payment of the family home. The Court also concluded that Janice had financially contributed to the family household. Based upon the foregoing and after estimating the equity in the family home at the time of the dissolution proceeding, the District Court ordered Debtor to pay Janice the sum of $4,750.00 as her contribution to the family home.[1] Such award was subject to a setoff of $174.00 for tires that Debtor purchased for Janice in May of 2003. Debtor was also authorized to subtract any amounts that Janice may owe Debtor for back child support and any medical, dental or optometric expenses incurred for the parties' child from which Janice has not made payment. The parties agree that the amount owed by Janice to Debtor stemming from the $6,000.00 award is not in the nature of alimony, maintenance or support. Debtor thus argues that such amount represents a lien that impairs Debtor's homestead exemption. Janice opposes Debtor's motion to avoid lien arguing that the Decree of Dissolution grants Janice an ownership interest in the home, as opposed to a lien. Janice, however, concedes that $1,250.00 of the award relates to equity in a car that Debtor sold, and that such amount does not create an ownership interest in Debtor's homestead property.

After reviewing the applicable law, including the United States Supreme Court's holding in *Farrey v. Sanderfoot*, 500 U.S. 291, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991), the Court finds that the Decree of Dissolution entered by the District Court did not grant Janice an ownership interest in Debtor's homestead property. In addition, for the reasons discussed below, Debtor is

[1] Janice was also awarded the sum of $1,250.00 as her interest in the proceeds of a 1977 Corvette that Debtor sold.

not entitled to avoid the lien that was created by virtue of the Decree of Dissolution.

The avoidance of judgment liens in bankruptcy is governed by 11 U.S.C. § 522(f)(1), which provides:

> Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is–
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> > (A) a judicial lien, other than a judicial lien that secures a debt–
> >
> > (i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement

In discussing § 522, the Ninth Circuit Court of appeals explained:

> [U]nder § 522(f)(1), a debtor may avoid a lien if three conditions are met: (1) there was a fixing of a lien on an interest of the debtor in property; (2) such lien impairs an exemption to which the debtor would have been entitled; and (3) such lien is a judicial lien. *In re Stone*, 119 B.R. 222, 226 (Bankr.E.D.Wash.1990). The debtor has the burden of demonstrating that he is entitled to avoid a judicial lien under § 522(f)(1). *See In re Butler*, 5 B.R. 360, 361 (Bankr.D.Md.1980).

Estate of Catli v. Catli (In re Catli), 999 F.2d 1405, 1406 (9th Cir. 1993). The question of whether a lien attached to a parcel of property before or after the debtor obtained an interest in the property is a question of state law. *Id*. at 1408 (*citing Farrey*).

In *Catli*, the Court held "that the critical issue in determining whether a debtor may avoid a lien under § 522(f)(1) is whether the debtor 'ever possessed the interest to which the lien fixed, before it fixed.'" *Id.* at 1408. With regard to the division of property under a divorce decree, the Supreme Court, in *Farrey* addressed "whether § 522(f) of the Bankruptcy Code allows a debtor to avoid the fixing of a lien on a homestead, where the lien is granted to the debtor's former

spouse under a divorce decree that extinguishes all previous interests the parties had in the property, and in no event secures more than the value of the nondebtor spouse's former interest." *Id.* at 296. There, the divorce decree granted the entire homestead property to Sanderfoot and simultaneously created a lien in favor of Farrey.[2] Thus, Sanderfoot obtained his interest in the subject property at the same time that Farrey's lien was created. The Supreme Court in *Farrey* concluded that "unless the debtor had the property interest to which the lien attached at some point *before* the lien attached to that interest he or she cannot avoid the fixing of the lien under the terms of § 522(f)(1)" and due to the simultaneous creation of a property interest and the fixing of the lien in a dissolution proceeding, the lien did not fix to a pre-existing property interest. *Id.* at 296, and 300-01. The Court in *Farrey* explained:

> Section 522(f)(1) does not state that any fixing of a lien may be avoided; instead, it permits avoidance of the "fixing of a lien on an interest of the debtor." If the fixing took place before the debtor acquired that interest, the "fixing" by definition was not on the debtor's interest. Nor could the statute apply given its purpose of preventing a creditor from beating the debtor to the courthouse, since the debtor at no point possessed the interest without the judicial lien. There would be no fixing to avoid since the lien was already there. To permit lien avoidance in these circumstances, in fact, would be to allow judicial lienholders to be defrauded through the conveyance of an encumbered interest to a prospective debtor. See *In re McCormick*, 18 B.R. 911, 913-914 (Bkrtcy.Ct. WD Pa.1982). For these reasons, it is settled that a debtor cannot use § 522(f)(1) to avoid a lien on an interest acquired after the lien attached. See, *e.g., In re McCormick, supra; In re Stephens*, 15 B.R. 485 (Bkrtcy.Ct. WD NC 1981); *In re Scott*, 12 B.R. 613

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[2] As set forth in *Farrey v. Sanderfoot*, 500 U.S. at 293:

"The decree granted Sanderfoot sole title to all the real estate and the family house[.] . . . The judgment also allocated the couples liabilities. . . . Sanderfoot stood to receive a net award of $59,508.79, while Farrey's award would otherwise have been $1,091.90. To ensure that the division of the estate was equal, the court ordered Sanderfoot to pay Farrey $29,208.44, half the difference in the value of their net assets. . . . To secure this award, the decree provided that Farrey 'shall have a lien against the real estate property of [Sanderfoot] for the total amount of money due her pursuant to this Order of the Court . . . and the lien shall remain attached to the real estate property . . . until the total amount of money is paid in full.'"

> (Bkrtcy.Ct. WD Okla.1981). As before, the critical inquiry remains whether the debtor ever possessed the interest to which the lien fixed, before it fixed. If he or she did not, § 522(f)(1) does not permit the debtor to avoid the fixing of the lien on that interest.

Id. at 298-299. This analysis is not altered by the 1994 amendments to 11 U.S.C. § 522(f)(1)(A).

Mindful of the foregoing, the Court must determine whether the District Court granted Janice an ownership interest in Debtor's homestead property. At the outset, this Court notes that it is obligated to give full faith and credit to existing court judgments, such as the Final Decree entered by the Montana First Judicial District Court, Lewis and Clark County.

As noted earlier, the extent of a party's interest in real property is determined pursuant to state law. *Catli, supra.* Mont. Code Ann. § 40-4-202(3) provides: "Each spouse is considered to have a common ownership in marital property that vests immediately preceding the entry of the decree of dissolution... The extent of the vested interest must be determined and made final by the court pursuant to this section." Mont. Code Ann. § 40-4-202(1) continues that the court "shall...finally equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired and whether the title thereto is in the name of the husband or the wife or both." This is precisely what Debtor's and Janice's Decree of Dissolution did–it finally and equitably apportioned both the marital assets and the marital debts of the parties. Under the dissolution laws of the State of Montana–where all prior interests in marital property are extinguished and new interests are created by virtue of a final decree–as read in conjunction with the Supreme Court's holding in *Farrey*, Janice's legal and equitable interest in the home was terminated on December 3, 2004, and Debtor's new interest was created. Janice had no further ownership interest in the home after that date.

The above finding comports with *Foss v. Foss*, 200 B.R. 660 (9th Cir. BAP 1996),

wherein the debtor owned a home prior to marrying Mr. Foss. *Id.* at 661. The couple later divorced, and the debtor was awarded the home. *Id.* The divorce court, however, found that the couple had made contributions to the home which resulted in a $20,000 community property interest therein. *Id.* Thus, in the divorce decree, the divorce court, while awarding the residence to the debtor, also awarded Mr. Foss a $20,000 lien against the home. *Id.* The debtor then filed bankruptcy and sought to avoid Mr. Foss' lien against the home. In affirming the bankruptcy court's denial of the debtor's request for lien avoidance, the Ninth Circuit Court of Appeals Bankruptcy Appellate Panel ("BAP") wrote:

> [A]lthough the Debtor previously held a separate interest in the property (subject to a $20,000 community property interest), the divorce decree simultaneously destroyed both the Debtor's separate property interest and the parties' community property interest and created two new property interests: (1) the Debtor's post-divorce separate property interest; and (2) Mr. Foss' $20,000 lien. Accordingly, the lien attached to the Debtor's post dissolution title at the time she received such title. Therefore, the Debtor may not avoid Mr. Foss's lien.
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> Additionally, we must emphasize that the holding in *Sanderfoot* makes clear that the question of what interests exist in the property prior to the dissolution of marriage is irrelevant if the court in the dissolution proceeding has the authority under state law to create new property interests and if the court actually creates such interests at the time the lien attaches. *Id.*, 500 U.S. at 299, 111 S.Ct. at 1830.
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> Accordingly,
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> > "[s]ince the [divorce court] had the power to strip the [Debtor] of [her] interest altogether, it can be reasoned that the court granted [her] the entered property on the condition that [her] prior interest would terminate and that a lien would attach to a new interest in the whole."
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> *In re Yerrington*, 144 B.R. at 100 n. 6 (*quoting Farrey v. Sanderfoot*, 500 U.S. at 301, 111 S.Ct. at 1832 (Kennedy, J., concurring)).
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> Therefore, even if the residence had remained the Debtor's separate property and no community property interest therein had been created during the marriage, the divorce decree would still have destroyed the Debtor's previous

interest and created a new one. *In re Yerrington*, 144 B.R. at 99-100, 100 n. 7. Foss, 200 B.R. at 663.

The BAP in *Foss*, following the holding set forth in *Farrey*, acknowledges that property interests are destroyed and created at the time a divorce decree is entered provided state courts are authorized to create new property interests. Montana statutory law plainly provides that the court "shall...finally equitably apportion between the parties the property and assets, belonging to either or both" and neither the Courts in *Farrey* or *Foss* require the parties to take additional steps, such as filing quitclaim deeds, to give full effect to a divorce decree.

Under Mont. Code Ann. § 25-9-301, Janice obtained a lien against Debtor's property on the date the Decree of Dissolution was entered in the District Court's judgment book. Following Mont. Code Ann. § 40-4-202 and the holdings in *Farrey* and *Foss*, Janice's lien was created simultaneously with Debtor's new post-dissolution interest in the homestead property. Because Debtor's "new" interest in the homestead property and Janice's lien were created simultaneously, Debtor did not possess his new interest in the homestead property prior to the date Janice's lien was created. *See also In re Quane*, 16 Mont. B.R. 475, 477-80 (Bankr. D. Mont. 1998) and *In re Kammerdiener*, 13 Mont. B.R. 1, 5-8 (Bankr. D. Mont. 1993). Accordingly,

IT IS ORDERED that the Court will enter a separate Order denying Debtor's Motion to Avoid Lien under 11 U.S.C.A. § 522(f) filed December 29, 2004.

BY THE COURT

Ralph B. Kirscher

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana